17 February 2026

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

ONETERA G. NELSON,
Staff Sergeant (E-5),
United States Air Force,
Appellant.

USCA Dkt. No. 26-0059/AF

Crim. App. Dkt. No. ACM 24042

BRIEF ON BEHALF OF APPELLANT

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WHETHER THE DEFENSE COUNSEL'S MERE FAILURE TO OBJECT WHEN THE MILITARY TRIAL JUDGE DOES NOT EXECUTE HIS SUA SPONTE DUTY TO INSTRUCT ON ALL REASONABLY RAISED DEFENSES AMOUNTS TO AN AFFIRMATIVE WAIVER OF THE RIGHT TO HAVE A PANEL INSTRUCTED ON ALL REASONABLY RAISED DEFENSES.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Relevant Authorities

Manual for Courts-Martial, United States (2019 ed.) (*MCM*), pt. IV, ¶ 18.c.(3)(d), in pertinent part, provides "*Ineptitude*. A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished."

Summary of Proceedings

Staff Sergeant Onetera G. Nelson (Appellant) was tried by a special court-martial composed of a panel of members at Tyndall Air Force Base (AFB), FL, on January 16-17, 2024. Joint Appendix (JA) at 11-14. In addition to one Charge and two Specifications of False Official Statements, Article 107, UCMJ, for which

Appellant pled – and was found – not guilty, the Charges and Specifications on which she was arraigned, her pleas, and the findings of the court-martial are summarized as follows:

Charge	UCMJ Art	Spec	Summary of Offense	Plea	Finding
I	92			NG	G
		1	Who should have known of her duties at or near Tyndall AFB, FL, o/a 8 July 2023, was derelict in the performance of those duties in that she negligently failed to complete the inspection folders for the month of June 2023 as instructed by Technical Sergeant (TSgt) [DH], as it was her duty to do.	NG	NG
		2	Who should have known of her duties at or near Tyndall AFB, FL, o/a 18 July 2023, was derelict in the performance of those duties in that she negligently failed to update the facility folders on the office share drive as instructed by TSgt DH, as it was her duty to do.	NG	G
		3	Who should have known of her duties at or near Tyndall AFB, FL, b/o/a 7 July 2023 and o/a 8 July 2023, was derelict in the performance of those duties in that she negligently failed to follow instructions given to her by TSgt [DH] by marking five inspections as complete on Defense Occupational and Environmental Health Readiness System without review by TSgt [DH], as it was her duty to do.	NG	G

JA at 11-12.

The military judge sentenced Appellant to a reprimand. JA at 11-12. The convening authority took no action on the findings or sentence. JA at 12.

The AFCCA denied relief and affirmed the findings and sentence on 24 October 2025. JA at 1-7.

Statement of Facts

In early 2023, Appellant was a Community Health Non-Commissioned Officer in Charge (NCOIC). JA at 211-12. In that role she was responsible for inspecting all food facilities on Tyndall AFB for sanitary conditions and vulnerability purposes. JA at 154-55, 211-12. Once the inspections were made, Appellant was then responsible for recording the results of those inspections in an electronic system called the Defense Occupational and Readiness Health System as well as in hard copy folders. JA at 156, 197-98, 212.

Although Appellant was the Community Health NCOIC, when TSgt DH returned from maternity leave on June 1, 2023, TSgt DH took over as the Community Health NCOIC and Appellant was reduced to the food and public facility sanitation NCOIC. JA at 211-12. At that point, TSgt DH then became Appellant's direct supervisor. JA at 154.

In June and July 2023, TSgt DH identified issues with the inspection folders for which Appellant was responsible. JA at 159. TSgt DH then raised those issues

to her supervisor, TSgt DM. JA at 154, 159. Eventually, Appellant's command charged her with dereliction of duty because of poor work performance. JA at 8.

Months before Appellant's court-martial commenced, trial defense counsel submitted a motion for appropriate relief requesting that the military judge order a mental examination of Appellant. JA at 15. In the motion, defense counsel stated there was "reason to believe that [Appellant] lacked mental responsibility to commit the charged offenses and lack[ed] capacity to stand trial." *Id*. The military judge granted the motion. JA at 19-22. Eventually, it was determined that Appellant was mentally responsible and competent to stand trial. JA at 23.

Despite the finding of competence, trial defense counsel made the effect Appellant's mental health had and her duty performance the centerpiece of their defense. The defense theory began in voir dire, where counsel asked, "Do all members agree that declining mental health can affect your performance?" JA at 109. Then, in the opening statement, trial defense counsel told the members that during the charged timeframe TSgt DH:

> [I]s aware that [Appellant] suffers from mental health disorders; that she is having a rough go of things. You are going to see in the evidence that despite that knowledge, [TSgt DH] just keeps pinging her, pinging her, pinging her with these duties that . . . aren't too difficult to accomplish[.]"

JA at 150.

Trial defense counsel then noted:

> Now it's not just [TSgt DH] that is aware of [Appellant's] mental health disorder, her declining mental health, and her struggles every day. It's everyone she works with, yet the leadership keeps pinging her, and that's all levels. It's her direct supervisor all the way up, keeps pinging her over and over and over again. This is a troop that's having a rough time. . . . As you listen to the evidence today and hear these witnesses testify, ask yourself has this person given her a chance to regain her mental health to be fit to fight?

JA at 151.

Trial defense counsel then ended the opening statement by saying, "[W]e will deliver the why, and you will find that she had no intent to commit any offense, and she is not guilty of being derelict of her duties. . . . She is suffering. She does not deserve to be punished." *Id*.

The impact of Appellant's mental health on her ability to perform her duties remained the center of the trial defense counsel's case theory through the cross-examination of the Government's witnesses, and into the defense's case-in-chief.

During the Government's case-in-chief, the defense counsel presented Appellant's ineptitude via mental health with the Government's first witness, the Public Health Flight Chief and Appellant's second line supervisor, TSgt DM. *See* JA at 171, 176-78. During the cross-examination TSgt DM admitted that her interactions with Appellant made TSgt DM aware that Appellant "was unable to perform her tasks due to mental health[.]" JA at 177. The defense then characterized TSgt DM's interactions with Appellant as Appellant "raising her hand" to ask for

help with her duties because she was "unable to complete [her] tasks, due to [her] mental health." JA at 177.

Trial defense counsel also focused TSgt DM on a July 2023 meeting between Appellant, TSgt DM, and TSgt DH to discuss Appellant's work performance. JA at 161. During the meeting, TSgt DM asked Appellant why she was missing her deadlines. *Id*. Trial defense counsel explored this conversation, asking TSgt DM, "Were you aware of [Appellant's] mental health last summer, June and July of 2023?" TSgt DM responded, "Not everything. She mentioned that some of the responsibilities she couldn't – some of the suspenses she couldn't meet were due to her mental health status." JA at 176. Trial defense counsel then elicited that TSgt DM became concerned enough about Appellant's mental health that he took his concerns to his Senior Enlisted Leader as well as his flight commander. JA at 177.

On cross-examination, Appellant's direct supervisor, TSgt DH, acknowledged that TSgt DH would "mostly likely" expect performance to dip for a subordinate dealing with mental health issues. JA at 236-37. TSgt DH also admitted to trial defense counsel that Appellant was "incapable" of doing more than she was doing at the time, and recounted that Appellant would ask for "mental health days." JA at 242-43. TSgt DH, also testified that Appellant had received multiple mental health evaluations. JA at 244.

During the defense's case-in-chief, with Appellant on the stand, trial defense counsel also presented to the members that once Appellant was transferred out of TSgt DH's section to another assignment, her mental health improved. JA at 300. Appellant explained to the members that once her mental health improved she was able to accomplish all her tasks at the new assignment. *Id*.

Trial defense counsel carried his theory through closing argument. Trial defense counsel argued:

> We heard that she's in treatment all day sometimes. *Did she have the ability, the opportunity to get all these tasks done? She did not.* She didn't have enough time to meet unrealistic expectations that were exclusively her's (*sic*).

JA at 347 (emphasis added).

Despite the evidence and the arguments regarding Appellant's mental health and its effect on her ability to carry out her duties, the military judge did not instruct the members on the defense of ineptitude to dereliction of duty offenses. *See* JA at 322-33. Trial defense counsel, when asked by the military judge whether he had any objections to the proposed instructions, stated, "No, sir." JA at 314. When asked "[w]hat other instructions do the parties request," trial defense counsel similarly stated, "No additional instructions, sir." *Id*.

On appeal, the AFCCA did not reach the merits of that omitted instruction. JA at 6. Instead, the AFCCA found that trial defense counsel's failure to ask for additional instructions or object to the proposed instructions amounted to an

affirmative waiver of the right to have the members instructed on the affirmative defense of ineptitude. *Id*.

Summary of the Argument

The panel of members – after being presented a consistent factual theory and evidence by the trial defense counsel that Appellant could not be guilty of her offenses because her mental health issues made her inept – were left ignorant of the significant fact that such ineptitude constituted an affirmative defense to the charged conduct. This is because, despite the theory and evidence of ineptitude being raised at every step of Appellant's court martial, the military judge never instructed the members on the defense, and the trial defense counsel never requested the military judge do so. Therefore, the panel had no idea what would legally qualify as the affirmative defense, nor did they even know that ineptitude was a legal defense at all, even though the trial defense counsel gave them fact after fact after fact of ineptitude.

Despite trial defense counsel presenting a factual theory of ineptitude to the members, there is nothing on the record indicating he understood the facts he was presenting amounted to an affirmative defense that the military judge had a sua sponte duty to instruct the members upon; an especially apparent observation given how an instruction on the ineptitude defense would have fit exactly with the defense's theory. Although trial defense counsel affirmatively declined to object to

the military judge's proposed instructions, the facts and circumstances of the case show that the declination was not made intelligently.

Lastly, in situations similar to this one, this Court has repeatedly found that affirmative waiver did not occur and, therefore, has tested the military judge's failure to instruct the members on an affirmative defense for plain error and, in at least one case, for harmlessness beyond a reasonable doubt. Thus, the principle of stare decisis counsels that no affirmative waiver occurred in this case.

Argument

THE DEFENSE COUNSEL'S MERE FAILURE TO OBJECT WHEN THE MILITARY TRIAL JUDGE DID NOT EXECUTE HIS SUA SPONTE DUTY TO INSTRUCT ON ALL REASONABLY RAISED DEFENSES DID NOT AMOUNT TO AN AFFIRMATIVE WAIVER OF THE RIGHT TO HAVE A PANEL INSTRUCTED ON ALL REASONABLY RAISED DEFENSES.

Standard of Review

Whether an instruction on a defense was waived is a question of law reviewed under a de novo standard. *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005).

Law and Analysis

"Waiver is different from forfeiture." *United States v. Olano*, 507 U.S. 725, 733 (1993). "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Id*.

(quotation marks and citation omitted). "Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *Id*. "Consequently, while [this Court] review[s] forfeited issues for plain error, 'we cannot review waived issues at all because a valid waiver leaves no error for us to correct on appeal.'" *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (quoting *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009)).

The right at issue in this case is not the general right to object to instructions. Nor is it the right to object to the omission of instructions on special defenses. The right at issue—that is to say, the right that must be affirmatively and intelligently waived—is the right to have the members instructed on the affirmative defense of ineptitude. *See United States v. Taylor*, 26 M.J. 127, 129 (C.M.A. 1988) (discussing the "right to an instruction on [a specific affirmative defense], when appropriately raised[.]")

A. The affirmative defense of ineptitude was reasonably raised by the evidence. Despite this, and despite the military judge's sua sponte duty to instruct on all reasonably raised defenses, the military judge failed to instruct the panel of members on the very defense that the trial defense counsel had presented to them throughout the court-martial.

A military judge has a sua sponte duty to instruct on an affirmative defense if reasonably raised by the evidence. *United States v. Maynulet*, 68 M.J. 374, 376

(C.A.A.F. 2010). The failure to so instruct must be tested for "prejudice using a 'harmless beyond a reasonable doubt' standard." *United States v. MacDonald*, 73 M.J. 426, 434 (C.A.A.F. 2014).

"The test whether an affirmative defense is reasonably raised is whether the record contains some evidence to which the court members may attach credit if they so desire." *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000). "It is not necessary that the evidence which raises an issue be compelling or convincing beyond a reasonable doubt." *Taylor*, 26 M.J. at 129.

"The defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised." *Davis*, 53 M.J. at 205. Any doubt whether an instruction should be given should be resolved in favor of the accused. *Id*.

"A right to an instruction on an affirmative defense which is reasonably raised by the evidence 'is not waived by a defense failure to request such an instruction.'"" *United States v. Barnes*, 39 M.J. 230 (C.A.A.F. 1994) (citation omitted). "Such instruction can only be 'affirmatively waived.'" *Id*. A court "cannot affirm appellant's conviction if there is a 'reasonable possibility' the judge's error in failing to instruct 'might have contributed to the conviction,' and we are not persuaded the error was harmless." *Id*.

1. **Ineptitude is a defense to the offense of dereliction of duty.**

Not all affirmative defenses are listed in Rule for Courts-Martial (R.C.M.) 916. *MacDonald*, 73 M.J. at 434-35. The list of defenses in R.C.M. 916 is illustrative, rather than exhaustive. *Id*.

Ineptitude is a defense to the offense of dereliction of duty under Article 92. *See United States v. Powell*, 32 M.J. 117, 120 (C.M.A. 1991) (stating the 1984 *Manual for Courts-Martial* (*MCM*), pt. IV, ¶ 16c(3)(c), "delineates the defense of ineptitude which [the CMA has] acknowledged as existing with respect to this offense.").

"A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished." *MCM*, pt. IV, ¶ 18.c.(3)(d) (2019 ed.).

In explaining the defense of ineptitude, the *Powell* court recognized an earlier edition of the *MCM* had a slightly expanded discussion regarding ineptitude, which said:

> *Thus, if it appears that the accused had the ability* and opportunity to perform his duties efficiently, but performed them inefficiently nevertheless, he may be found guilty of this offense. *However, an accused may not be charged under this article, or punished otherwise, if his failure in the performance of his duties is caused by ineptitude* rather than by willfulness, negligence, or culpable inefficiency.

Powell, 32 M.J. at 120-21 (quoting *MCM*, ¶ 171c (1951 ed.) (emphasis in the original). This discussion lines up with the standard definition of ineptitude.

Merrian-Webster's Collegiate Dictionary defines ineptitude as "the quality or state of being inept" and defines inept as "lacking in fitness or aptitude." Merriam-Webster's Collegiate Dictionary, 638 (11th ed. 2003).

The *Powell* court then went on to say:

> In view of the above, ineptitude as a defense is largely fact-specific, requiring consideration of the duty imposed, the abilities and training of the soldier upon whom the duty is imposed, and the circumstances in which he is called upon to perform this duty. The factfinder must determine whether this defense exists in a particular case.

Powell, 32 M.J. at 121. Thus, the nature of the defense of ineptitude centers on the fitness and ability of an accused.

2. There was evidence that the members could have attached credit to in order to find Appellant's mental health struggles negatively affected her ability to carry out her duties, thus making her inept, rather than negligent.

Although not phrased as such, trial defense counsel focused on the fitness and the ability of Appellant – that is to say, the ineptitude of Appellant – throughout the trial.

Trial defense counsel initially placed the subject of ineptitude – albeit without labeling it as such – in front of the members during voir dire by asking if they agreed that declining mental health can affect performance. JA at 109. The theory continued into the opening statement, when trial defense counsel explained that Appellant's ineptitude was due to her mental health disorders and her supervisors were well aware of the cause of the ineptitude. JA at 150-51.

Trial defense counsel continued the presentation of Appellant's ineptitude via mental health through the Government's witnesses. *See* JA at 171, 176-78 (cross-examining TSgt DM regarding Appellant's inability to complete her tasks due to her mental health,); JA at 236-37, 242-44 (cross-examining TSgt DH regarding Appellant's dip in performance being due to her mental health issues, Appellant being incapable of doing more than she did, Appellant's multiple mental health evaluations, as well as the "mental health days" Appellant requested.))

Trial defense counsel then solidified the theory of ineptitude the defense case-in-chief when Appellant herself explained how her mental health appointments interfered with her ability to complete her duties. JA at 297-98. She also explained how, after her mental health improved, she was able to accomplish her duties again. JA at 300.

Finally, even after the military judge's instructions, JA at 322-33, trial defense counsel capped the theory of ineptitude by arguing during the closing argument:

> We heard that she's in treatment all day sometimes. Did she have the ability, the opportunity to get all these tasks done? She did not. She didn't have enough time to meet unrealistic expectations that were exclusively her's (*sic*).

JA at 347.

The defense's entire theory revolved around Appellant's inability to function at a higher level and accomplish her duties because of the mental health issues she was struggling with. While some of that theory was presented as argument, much

of it appears as testimony from the Government's own witnesses. The members could have attached credit to this evidence to find Appellant's struggle with mental health negatively affected her ability to carry out her duties, thus making her inept, rather than negligent. And, because the evidence of ineptitude existed, the military judge had the sua sponte duty to instruct the panel of members on the defense.

B. The facts and circumstances of this case show that the trial defense counsel did not affirmatively waive the right to have the panel instructed on the defense of ineptitude.

As discussed *infra*, the facts and circumstances of this case demonstrate that any purported waiver by the trial defense counsel was not intelligent, and, thus, was not an affirmative waiver. *See United States v. Malone*, __ M.J. __, 2026 CAAF LEXIS 62 (C.A.A.F. Jan. 20, 2026).

1. The mere affirmative declination to object to a military judge's omission of an affirmative defense instruction is not an affirmative waiver of that instruction. Instead, a court must look to the facts and circumstances of each case to decide if intelligent waiver occurred.

In the 2020 case *United States v. Davis*, this Court recognized that an appellant's failure to object to an instruction or the omission of an instruction constituted a forfeiture that could be reviewed for plain error. 79 M.J. 329, 331 (C.A.A.F. 2020). This Court then drew a distinction between merely failing to object, and "affirmatively declin[ing] to object to the military judge's instructions and offer[ing] no additional instructions." *Id*. By affirmatively declining to object,

trial defense counsel "'expressly and unequivocally acquiesce[ed]' to the military judge's instructions," which, in turn, amounted to waiver rather than forfeiture. *Id*.

However, this Court recently underscored the fact-dependent nature of waiver, and in doing so narrowed the application of *Davis* to this case. *Malone*, 2026 CAAF LEXIS 62. In *Malone*, this Court stated that an affirmative waiver requires more than just an affirmative act on the trial defense counsel's part. *Id*. at *9. Affirmative waiver also requires a showing that the trial defense counsel "intentional[ly] relinquish[ed] or abandon[ed] . . . a known right." *Id*. This determination, in turn, "must depend, in each case, upon the particular facts and circumstances surrounding that case." *Id*. at *10-12 (stating "we must examine whether there was an 'intentional relinquishment or abandonment of a known right.'").

In determining if there was an intentional relinquishment of a known right, "there are no magic words to establish affirmative waiver;" instead "[i]n making waiver determinations, [this Court] look[s] to the record to see if the statements signify that there was a 'purposeful decision' at play" by the defense counsel. *United States v. Gutierrez*, 64 M.J. 374, 377 (C.A.A.F. 2007) (quoting *United States v. Smith*, 50 M.J. 451, 456 (C.A.A.F. 1999)).

In the instant case, while the AFCCA hinged its conclusion of waiver on whether there was an objection to the proposed instructions, JA at 10, it failed to

assess whether that lack of objection amounted to an intelligent waiver, as required by this Court's precedents and the facts of Appellant's case.

2. The facts and circumstances of this case demonstrate that the trial defense counsel did not affirmatively waive the right to have the panel instructed on the defense of ineptitude because any such purported waiver was not done intelligently.

Trial defense counsel presented to the panel of members all the facts needed to find the existence of the affirmative defense of ineptitude. When coupled with the defense counsel's failure to request an instruction on the affirmative defense of ineptitude, the inevitable conclusion is that there was no purposeful decision on the trial defense counsel's part to waive the ineptitude instruction. Indeed, the reasonable conclusion to draw from the facts and circumstances of this case is that trial defense counsel did not know that ineptitude was an affirmative defense.

Throughout the entirety of this case, it was clear that trial defense counsel was presenting the factfinder with the specific facts necessary to raise the defense of ineptitude. As stated *supra*, trial defense consistently presented the theory of ineptitude from a pretrial motion for a mental examination, through voir dire, into the cross-examination of the Government's witnesses, into direct examination of Appellant herself, and culminating in an closing argument that argued Appellant was inept.

The trial defense counsel's theory that Appellant was not guilty because she was inept due to her mental health struggles is indisputable. Yet, the trial defense

counsel never requested that the members be instructed on the very defense he had spent the trial presenting; an instruction that would have tied the entire theory together for the members.

Given this fact, there is no intelligent reason—beyond the simple lack of knowledge, or misunderstanding, of the defense of ineptitude—to explain why the trial defense counsel failed to request an instruction on the defense of ineptitude. These facts and circumstances demonstrate that trial defense counsel either did not know or did not understand that, despite raising facts of the defense throughout trial, he was actually presenting the defense of ineptitude. Because he did not know or understand, he could not have known to ask for an instruction on the defense of ineptitude. And if he did not know to ask for an instruction on the defense of ineptitude, he could not have intelligently waived the right to have the members instructed on the defense.

3. The facts and circumstances that this Court found amounted to an affirmative waiver in *United States v. Malone* are distinguishable from the facts and circumstances of this case.

In *United States v. Malone*, this Court examined the facts and circumstances of that case to determine "whether there was an 'intentional relinquishment of a known right.'" *Malone* at *10-12 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). As part of that examination, this Court was "persuaded by the Government's argument that it is appropriate . . . to consider the fact that [the

appellant] chose not to file an ineffective assistance of counsel [IAC] claim against the attorney who represented him at trial." *Id*. This Court then found, based largely on presumptions drawn from the appellant's failure to file IAC against the trial defense counsel, that four areas supported a finding that the appellant had affirmatively waived the right at issue.

However, for the reasons stated below, the factors this Court found in *Malone* to support a waiver are either missing from this case or, if present, should be read narrowly and should not control this case.

i. The facts and circumstances of this case are distinguishable from the facts and circumstances of *Malone* which this Court found amounted to an affirmative intelligent waiver.

In *Malone*, this Court said because IAC was not raised against the trial defense counsel, there is a presumption that he was competent. *Id*. at *12. And, if he was competent, then the Court would presume that he would have known certain things and taken certain actions; specifically, this Court presumed four areas of knowledge and action. *Id*. at *13-15 And, had he known those things and took those actions, then his right to object to the multiplicity of the specifications could be presumed as a "known right." *Id*. at *13. Because he knew about that right, the guilty plea acted as an intelligent waiver of the right. *Id*.

However, the four areas of knowledge and action this Court used as a basis to find an intelligent waiver in *Malone*, are not present in the instant case. First, this

Court stated that the trial defense counsel would have known that the Rules for Courts-Martial (RCM) plainly talk about the right at issue; namely that multiplicity is a proper grounds for dismissal. *Id*. at *13. The defense of ineptitude, on the other hand, is not as glaring as multiplicity. There is no mention of the defense of ineptitude in the RCMs. Indeed, there is no mention of the defense of ineptitude in the Military Judge's Electronic Benchbook. *See Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 3a-18-3 (last accessed on February 12, 2026). The *Manual for Courts-Martial* talks about the affirmative defense of ineptitude one time in the Explanation section of the Article 92 paragraph. *Manual for Courts-Martial, United States* (2024 ed.) (*MCM*), pt. IV, ¶ 18.c.(3)(d). It does not appear elsewhere. Thus, while a presumption may exist that a competent counsel would know about multiplicity, the same does not hold true for the defense of ineptitude.

Second, this Court found that competent counsel would not overlook potentially meritorious multiplicity claims. *Id*. In the instant case however, as explained above, the defense of ineptitude is not as apparent as a claim of multiplicity. Thus, a fallible but competent counsel could realistically overlook the defense of ineptitude in the instant case but still have functioned competently.

Third, this Court looked to the language of the plea agreement in *Malone* and said that it would have "prodded [counsel] to consider whether multiplicity issues

were lurking in the case." *Id*. at *14. Obviously, no such language existed in this case as it was fully litigated.

Lastly, this Court stated that a competent counsel "would have discussed with his client the advantages and disadvantages of seeking the dismissal of some of the specifications on multiplicity grounds." *Id*. at *15. Again, this assumes that the trial defense counsel recognized the issue in the first instance so that he could discuss it with his client. But, unlike *Malone*'s multiplicity, the existence of the affirmative defense of ineptitude is not glaringly apparent from looking at a charge sheet.

Aside from these four areas, this Court also pointed to the benefits the accused received in *Malone* by not raising multiplicity as being indicative of an intelligent waiver. *Id*. at *16-17. Specifically, this Court pointed out that, by not raising multiplicity, the accused benefited from the pretrial agreement that withdrew and dismissed a number of serious specifications. *Id*. at *17. Unlike *Malone*, Appellant received no benefit from the panel not being instructed on the defense. This was a fully litigated court martial in which the trial defense counsel's factual theory was ineptitude. An instruction on the defense of ineptitude could only have been beneficial, while the lack of the instruction could only have been detrimental.

ii. The there is little to no value in looking to whether IAC was raised against trial defense counsel in order to determine if trial defense counsel's waiver was intelligent.

Separate from the distinguishability of the *Malone* facts, is the question of what value there is in looking to the filing of IAC against trial defense counsel when deciding if a waiver by trial defense counsel was intelligent. Understanding that this Court recently considered the filing of IAC as a factor in finding waiver, for at least the five reasons stated below, looking to whether IAC was filed against trial defense counsel in order to determine if a waiver is intelligent is misguided.

(a). The authority this Court cited for that proposition does not support it.

In *Malone*, this Court cited to *Strickland v. Washington*, 466 U.S. 668, 689 (1984), as authority for assessing waiver through a lack of filing IAC against the trial defense counsel. Specifically, this Court said appellant's "failure to [file IAC against the trial defense counsel] results in a presumption that defense counsel acted in a competent manner, and this presumption influences our analysis of this case." *Malone*, 2026 CAAF LEXIS 62, at *11.

However, *Strickland* says no such thing; the *Strickland* Court said that the presumption of competence exists regardless of whether IAC was, or was not, filed. *See Strickland*, 466 U.S. at 689. Specifically, the Supreme Court said:

> Because of the difficulties inherent in making the evaluation [of trial defense counsel's performance], a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Thus, the "strong presumption" of competence exists regardless of whether appellate counsel files an IAC claim. Or, stated another way, that presumption does not disappear upon the filing of an IAC claim by an appellate defense counsel. Because that presumption is present regardless of the filing of IAC, there is little to no value in looking to the filing of IAC to determine if there was an affirmative waiver.

(b). Looking to the filing of IAC as a factor for waiver will negatively impact judicial economy.

In *Strickland*, the Supreme Court made the common-sense point that demonstrates why it would be bad policy to look to the filing of IAC to inform a waiver analysis. The Supreme Court pointed out that "[t]here are countless ways to provide effective assistance of counsel in any given case." *Strickland*, 466 U.S. at 689. Thus, the "strong presumption" of competence exists because "[t]he availability of intrusive post-trial inquiry into attorney performance . . . would encourage the proliferation of ineffectiveness challenges." *Id*. at 690. With that proliferation of ineffectiveness challenges comes all the procedures associated with an IAC claim. The claims can initially be raised on direct appeal at the Court of Criminal Appeals (CCA) level. *See Loving v. United States*, 64 M.J. 132, 157 (C.A.A.F. 2006). This can lead to motions to compel affidavits from trial defense counsel to explain their conduct, the ordering of which trial defense counsel can

contest. *See United States v. Lewis*, 42 M.J. 1, 5 (C.A.A.F. 1995). At times affidavits are not enough, and the CCA must order hearings in order to develop the facts surrounding the allegation of IAC. *See United States v. Perez*, 39 C.M.R. 24, 26 (C.M.A. 1968). Then, of course, appellate counsel—defense or Government—can potentially raise a new set of errors on direct appeal that specifically deal with whether the CCA handled the IAC procedures correctly. *See United States v. Ginn*, 47 M.J. 236, 243 (C.A.A.F. 1997) (regarding a claim by the Government that the CCA erred in not ordering a hearing); *United States v. Grigoruk*, 52 M.J. 312, 313 (C.A.A.F. 2000) (regarding a claim by the defense that the CCA failed to compel trial defense counsel provide an affidavit when a viable claim of IAC had been raised).

Additionally, to take that proliferation problem one step further, if the only way to get to a plain error analysis at the appellate level is to allege IAC, every plain error issue raised by appellate defense counsel will be accompanied by a corresponding IAC claim; not necessarily because the appellate counsel believes IAC exists, but because appellate counsel will be unwilling to allow a difference of opinion regarding trial defense counsel's effectiveness to dictate whether a plain error occurred.

(c). Plain error can exist without IAC existing.

At least in the context of failing to object to a court's failure to instruct members on an affirmative defense, using IAC as a predicate to find plain error would collapse IAC into plain error, even though they are two different standards whereby plain error can exist without IAC.

Writing for the Seventh Circuit, Judge Posner discussed the intersection of plain error and ineffective assistance of counsel:

> But we do not think, as the government argued, that the error must be plain in the further sense that it leaps out at the reader of the district court's decision--that it is obvious in the sense of being a tyro's error, an error that only a first-year law student would have made, a ludicrous error, an error that condemns the lawyer who failed to bring it to the judge's attention of professional incompetence and the judge of judicial incompetence for having failed to notice it. *If the plain-error doctrine were so confined it could almost never be invoked successfully, if only because it would be virtually coextensive with the doctrine of ineffective assistance of counsel.* So, while the error must be straightforward, it can be so in hindsight.

United States v. Caputo, 978 F.2d 972, 975 (7th Cir. 1992) (emphasis added).

This makes sense given the different standards required for plain error and IAC. To establish plain error, an appellant need only demonstrate that (1) there was error, (2) that error was plain or obvious, and (3) the error materially prejudiced a substantial right. *United States v. Paxton*, 64 M.J. 484, 487 (C.A.A.F. 2007). IAC, on the other hand, requires (1) that counsel's conduct fell below an objective standard of reasonableness, and (2) prejudice. *United States v. Russell*, 48 M.J. 139, 140 (C.A.A.F. 1998). The fact that an error is plain or obvious does not necessarily

mean that counsel's conduct in failing to fix that error falls below an objective standard of reasonableness. As pointed out by Judge Posner, an error can be plain without the trial defense's failure to object to the plain error falling below an objective standard of reasonableness. This is especially true given that, while "Courts strongly presume that counsel has provided 'adequate assistance,'" *id*., no such corollary presumption exists for plain errors.

Thus, co-mingling the assessment of plain error with the assessment for IAC risks heightened confusion when determining whether trial defense counsel waived an error. An appellate counsel can raise an error because it is plain, without the belief that the error can overcome the "strong presumption" of adequate assistance. As this Court's decisions illustrate, the failure to object to the military judge's failure to instruct members on an affirmative defense must be plain error in order to also be IAC, but that failure need not be IAC in order to be plain error. *See, e.g.*, *United States v. Bono,* 26 M.J. 240, 242 n.2 (C.M.A. 1988) (stating that the Court "do[es] not mean to imply that a finding of plain error will automatically equate to ineffective assistance of counsel); *United States v. Schmidt*, 82 M.J. 68, 74 n.2 (C.A.A.F. 2022) ("Appellant's failure to show plain error is fatal to his ineffective assistance of counsel claims . . . Appellant cannot demonstrate that his counsel's failure to object to the military judge's instruction on 'in the presence of' was deficient when there is no plain or obvious error.").

(d). Focusing on IAC as a threshold converts the traditional waiver analysis from scrutiny of the trial proceedings to a review of an appellate defense counsel's post-trial actions.

As pointed out by this Court, "[i]n making waiver determinations, we *look to the record* to see if the statements signify that there was a 'purposeful decision' at play." *Gutierrez*, 64 M.J. at 377 (emphasis added). Presumably, the "record" referenced in *Guitierrez* was the trial record, not the appellate record. Indeed, it is difficult to imagine a situation in which the facts surrounding what a trial defense counsel said to a trial judge during a court-martial are converted from an affirmative waiver to a forfeiture, or vice versa, based on what an appellate counsel did months – if not years – later.

The facts on the record are the facts on the record; they do not change based on actions that occur after the panel is dismissed and the military judge goes home. Trial defense counsel either affirmatively waived a right during the court-martial or he did not; subsequent actions by appellate counsel cannot change that. Yet *Malone's* focus on the filing of IAC seems to ask courts assessing waiver to endeavor to do so.

(e). Looking to whether IAC was filed conflicts with the settled understanding that raising IAC is disfavored on direct appeal.

Raising IAC on direct appeal is generally disfavored, yet *Malone* would seem to require it if counsel seeks a plain error review. As this Court has summarized:

> [T]he Supreme Court recognized that "in most cases a [habeas corpus] motion . . . is preferable to direct appeal for deciding claims of

> ineffective-assistance." The Supreme Court also stated that a district court, a factfinding forum, rather than an appellate court is "best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." The Supreme Court explained this point stating, "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." The Supreme Court pointed out the advantages of a habeas proceeding in developing the factual predicate for an ineffective assistance of counsel claim stating that, the "court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance."

Loving, 64 M.J. at 149 (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)).

Given that direct appeals of IAC are disfavored, that the appellate courts are not the best suited to address claims of IAC, and that collateral attacks are better suited for IAC claims so that the record may be fully developed, it logically does not make sense to look to whether IAC was raised against trial defense counsel in order to determine whether an affirmative waiver occurred. To do so would be to erroneously read the existence of a specific meaning behind appellate defense counsel's actions that does not necessarily exist. Because the Supreme Court and this Court have said that, generally speaking, raising claims of IAC on direct appeal are disfavored, the only inferences that can be had from appellate defense counsel's actions are that counsel has read the law and acknowledges that there are a number of reasons why claims of IAC are generally disfavored on direct appeal.

C. To the degree that *Malone* is not a clarification of *Davis*, *Davis* should be read narrowly to not apply to a situation such as this where the trial defense counsel merely tells a military judge that he has no objection to the judge's omission of an affirmative defense instruction.

This Court's precedent has not treated a trial defense counsel's declination to object to a military judge's instructions as affirmative waiver in the context of members being instructed on a reasonably raised affirmative defense. Indeed, this Court has held the exact opposite, and for good reason. A mere affirmative declination provides no insight into whether the trial defense counsel understood the nature of the right being abandoned and the consequences of the decision to abandon it; that is to say, whether the purported waiver was intelligent.

1. Merely stating "no objection" to a military trial judge's instructions in no way illuminates whether an alleged waiver was intelligent.

In *Davis*, this court, in finding affirmative waiver, said the appellant "did not just fail to object," he also "affirmatively declined to object to the military judge's instructions, and in doing so waived all objections to the instructions." *Davis*, 79 M.J. at 330. The "affirmative declination" consisted of the trial defense counsel telling the military judge "no changes, sir" when asked if there were any objections or requests for additional instructions, and replying, "No, Your Honor,' when later asked if there were any objections to the instructions. *Id*. To the degree that *Davis* stands for the proposition that a trial defense counsel "affirmatively declining to

object" to the military judge's instructions—without something more—amounts to an affirmative waiver, it was decided incorrectly.

At least since the beginning of the modern American military justice system, there has been a requirement that certain affirmative waivers be "intelligent." *See, e.g.*, *United States v. Beer*, 19 C.M.R. 306 (C.M.A. 1955). The question of whether a purported waiver is intelligent is different from whether there is an affirmative act that initiates the purported waiver. Indeed, this Court's recent case of *Malone* clearly points out that the two concepts are separate and distinct. 2026 CAAF LEXIS 62, at *9 (stating that an "express waiver" occurs when there is "the 'intentional relinquishment or abandonment of a known right,' *and* is accomplished via affirmative action by the accused or the accused's counsel") (citations omitted, emphasis added)). An intelligent waiver is one that is "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Colorado v. Spring*, 479 U.S. 564, 573 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, 421 (1986)). The mere act of telling a military judge "no additional instructions" when asked for input, does nothing to illuminate whether trial defense counsel had "full awareness of the nature of the right" to have the members instructed on the defense of ineptitude and, yet, chose to abandon that right anyway.

2. This Court's precedent–which has not treated a trial defense counsel's affirmative declination as an intelligent waiver in the context of instructions of affirmative defenses–dictates a narrow reading of *Davis*.

In the context of instructions on reasonably raised affirmative defenses, prior precedent did *not* find affirmative waiver based on a trial defense counsel's affirmative declination to object to instructions or request additional instructions. Instead, this Court treated the issue as being forfeited, and continued to review the issue for plain error. Thus, to the extent that *Davis* can be read to suggest that plain error review is never appropriate when trial defense counsel affirmatively declines to object to the military judge's omission of instructions on affirmative defenses, it is contrary to the great weight of authority.

In this Court's case, *United States v. Feliciano*, the military judge informed the trial defense counsel that an instruction on the special defense of mistake of fact was going to be given. 76 M.J. 237, 238 (C.A.A.F. 2017). However, no mention was made by the military judge or the trial defense counsel of the special defense of voluntary abandonment. *Id*. When the trial judge asked the trial defense if he had "any additional requests," trial defense affirmative declined, stating "No, [y]our honor." *Id*. at 238-39. On appeal, the issue was raised as to whether it was error for the military judge to fail to instruct the members on the additional special defense of voluntary abandonment. *Id*. at 239-40. This Court noted that the trial defense counsel did not object to the omission, but—despite trial defense counsel's

affirmative declination to object—held that the issue was "forfeited and we review for plain error." *Id*. at 240.

As authority for the appropriateness of the plain error review in *Feliciano*, this Court cited to *United States v. Davis*, 76 M.J. 224 (C.A.A.F. 2017). *Id*. In *Davis* the appellant argued that the military judge's failure to instruct the panel of members on a mistake-of-fact defense was error. *Davis*, 76 M.J. at 227. While the case does not explicitly say whether the trial defense counsel affirmatively declined to object to the military judge's omission of the defense instruction, this Court held, "Because Appellant did not object to the instructions given or request a mistake-of-fact instruction, we review this case for plain error." *Id*. at 229. While ultimately this Court found that the defense was not reasonably raised by the evidence, it first performed a plain error review in order to make that assessment. *Id*. at 226.

Similarly, in yet another *Davis* case, this Court reviewed the omission of an unrequested affirmative defense instruction under the harmless beyond a reasonable doubt standard. 73 M.J. 268, 269 (C.A.A.F. 2014). In that case, although the military judge provided a self-defense instruction, and the "[t]rial defense counsel did not request a defense of property instruction and the military judge did not sua sponte issue such an instruction" this Court reviewed the omission for harmlessness beyond a reasonable doubt. *Id*. at 270. While this Court did imply that plain error may have been the more appropriate standard of review, at no time did this Court

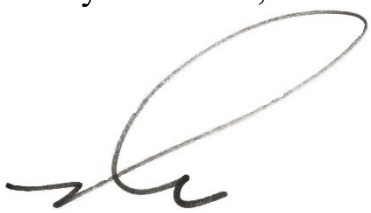
say that trial defense counsel had affirmatively waived the right to have the members instructed on the defense. *Id*. at 271 n.4.

Then there is this Court's decision in *United States v. Barnes*. 39 M.J. 230 (C.A.A.F. 1994). In *Barnes* the appellant was charged with failure to go. *Id*. at 232. During the closing argument, trial defense counsel argued to the members that the military judge would be instructing them on the affirmative defense of inability to return. *Id*. at 232. Trial counsel objected, and the members were never instructed on the defense. *Id*. This Court reviewed for plain error. *See id*. at 231. Despite trial defense counsel's clear knowledge of the special defense, and despite his lack of affirmatively requesting members be instructed on the defense (for, if he had requested the instruction, this Court would not have been reviewing for plain error), this Court found error and reversed. *Id*. at 233. This Court noted that a "right to an instruction on an affirmative defense which is reasonably raised by the evidence 'is not waived by a defense failure to request such an instruction.'" *Id*. "Such instruction can only be 'affirmatively waived.'" *Id*. It is clear from this Court's precedent that a trial defense counsel affirmatively declining to object to the military trial judge's instructions when those instructions involve affirmative defenses has not amounted to an affirmative waiver of the right. It is further clear that courts and counsel have relied on that precedent, and that their ability to rely on that precedent promoted the "evenhanded, predictable, and consistent development of legal

principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Tualla*, 52 M.J. at 231. Thus, stare decisis counsels this Court to not find affirmative waiver in this case.

WHEREFORE, Appellant respectfully requests this Honorable Court reverse the Air Force Court of Criminal Appeals decision on waiver, and remand this case for an analysis of the substantive issue.

Respectfully submitted,



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Certificate of Filing and Service

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on 17 February 2026.

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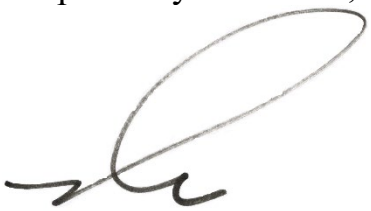

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This brief complies with the type-volume limitation of Rule 24 of no more than 13,000 words because it contains approximately 9,393 words.

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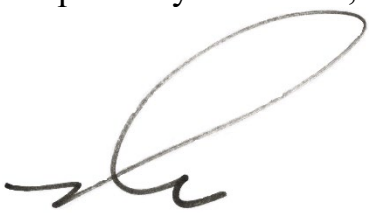
Respectfully submitted,



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